CHERIE BOOTH QC

v.

ATTORNEY GENERAL, MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
ALAUDDIN MOHD SHERIFF FCJ
NIK HASHIM FCJ
[CIVIL APPEAL NO: 02-22-2006 (W)]
18 SEPTEMBER 2006

LEGAL PROFESSION: *Admission - Ad hoc - Queen's Counsel - Special qualifications or experience - Whether refers to particular field of law to which a particular case is related - Whether available amongst local advocates and solicitors in Malaysia - Legal Profession Act 1976, s. 18(1)*

This was an appeal against the decision of the High Court refusing the application of an *ad hoc* admission of the appellant, Cherie Booth QC, to the Malaysian Bar pursuant to s. 18(1) Legal Profession Act 1976 ('LPA') for the purpose of appearing in two Federal Court appeals. The respondents' main ground of objection was that the appellant had no special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. Hence, the only issue requiring determination was whether the appellant had shown that she had such qualifications or experience that would render her eligible for such admission.

Held (dismissing the appeal)
Per Nik Hashim FCJ:

(1) On the appellant's expertise, the learned judge was right in holding that the appellant was a leading Queen's Counsel distinguishing herself in public and administrative law. However, the learned judge was not quite right when she further held that it was not sufficient that the appellant be a specialist in public law *per se* but that she must also be a specialist on the issue of judicial bias. The "special qualifications or experience" under s. 18(1)(a) LPA refers to the particular field of the law to which that particular case is

related, and not in respect of each and every issue that arises in that case. Thus, the learned judge's insistence on specialization on a specific issue as opposed to the area of the law in which this case fell was too stringent a requirement. It was therefore erroneous on her part to impose such a requirement of qualification for an *ad hoc* admission under s. 18(1)(a) LPA. (para 17)

(2) It was pertinent to note that Fawziah Holdings had appointed Dato' R R. Sethu as senior counsel to argue the case in the High Court. In the Court of Appeal, Fawziah Holdings appointed Dato' Dr. Cyrus Das as senior counsel. Both were experienced senior members of the Bar and were capable of handling the pending appeals in the Federal Court. It was, therefore, not true that there was no availability of local advocates and solicitors of a quality and type amongst the 12,000 in Malaysia who were equally qualified and experienced to handle the appeals. Furthermore, there was the question as to what extent the appellant would effectively be able to assist the Federal Court since she had not been present during the trial in the High Court and the appeal in the Court of Appeal. Surely, a foreign counsel, like the appellant, lacking in local knowledge and not having handled the trial and the appeal, would necessarily be disadvantaged in handling the appeals in the Federal Court. (paras 25 & 26)

(3) In the light of the above, the appellant's appeal had to be dismissed since it had not been demonstrated that the appellant had special qualifications and experience of a nature not available amongst advocates and solicitors in Malaysia for the two appeals before the Federal Court. The two appeals could be competently handled by a local advocate and solicitor. (para 27)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana menolak permohonan menerima-masuk perayu secara *ad hoc* ke dalam Bar Malaysia di bawah s. 18(1) Akta Profesion Guaman 1976 ('LPA') bagi membolehkan perayu hadir sebagai peguam di dua rayuan di Mahkamah Persekutuan. Bantahan utama responden-responden adalah bahawa perayu tidak memiliki kelayakan atau pengalaman khas yang tidak dimiliki oleh peguam-peguam dan peguamcara-peguamcara tempatan. Isu tunggal yang

berbangkit adalah sama ada perayu telah membuktikan bahawa beliau mempunyai kelayakan atau pengalaman yang dimaksudkan sekaligus melayakkan beliau untuk diterima-masuk.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMP:

(1) Mengenai kepakaran perayu, yang arif hakim betul dalam memutuskan bahawa perayu adalah seorang Queen's Counsel yang terkemuka dan pakar dalam bidang undang-undang awam dan pentadbiran. Namun, yang arif hakim agak silap apabila seterusnya menyatakan bahawa adalah tidak memadai untuk perayu mempunyai kepakaran dalam undang-undang awam *per se* kerana beliau harus juga mempunyai kepakaran berhubung isu berat sebelah kehakiman. Ungkapan "special qualifications or experience" dalam s. 18(1)(a) LPA merujuk kepada bidang undang-undang yang ada kaitan dengan kes yang dibicara, dan bukannya kepada setiap isu yang berbangkit dalam kes tersebut. Oleh itu, desakan yang arif hakim supaya ditunjukkan pengkhususan atas isu spesifik, dan tidak semata-mata bidang undang-undang, adalah satu kehendak yang terlalu ketat. Adalah salah bagi beliau untuk mengenakan kelayakan sedemikian bagi penerimaan-masuk *ad hoc* di bawah s. 18(1)(a) LPA.

(2) Adalah berkaitan untuk menyatakan bahawa Fawziah Holdings telah melantik Dato' R. R. Sethu sebagai peguam kanan bagi menghujahkan kesnya di Mahkamah Tinggi. Di Mahkamah Rayuan, Fawziah Holdings melantik pula Dato' Dr. Cyrus Das sebagai peguam kanannya. Kedua-dua mereka adalah ahli Bar yang senior dan berpengalaman dan berkeupayaan untuk mengendalikan rayuan-rayuan di Mahkamah Persekutuan. Oleh itu, tidaklah benar bahawa di kalangan 12,000 peguam atau peguamcara di Malaysia, tidak terdapat mereka yang mempunyai kebolehan dan kelayakan yang diperlukan bagi mengendalikan rayuan-rayuan. Lagipun, wujud persoalan tentang setakat manakah perayu dapat membantu Mahkamah Persekutuan, disebabkan beliau tidak hadir di perbicaraan di Mahkamah Tinggi dan di rayuan di Mahkamah Rayuan. Seorang peguamcara luar seperti perayu, yang tidak mempunyai pengetahuan mengenai halehwal tempatan, dan tidak mengendalikan perbicaraan dan rayuan seperti yang dikatakan di atas, tentunya mengalami kesukaran untuk mengendalikan rayuan-rayuan di Mahkamah Persekutuan.

(3) Atas sebab-sebab yang diberi, rayuan perayu terpaksa ditolak kerana tidak dibuktikan bahawa perayu mempunyai kelayakan dan pengalaman khusus yang tidak didapati di kalangan peguam-peguam dan peguamcara-peguamcara di Malaysia bagi maksud kedua-dua rayuan di Mahkamah Persekutuan. Kedua-dua rayuan boleh dikendali secara berkompeten oleh peguam dan peguamcara tempatan.

Case(s) referred to:

Attorney General & Ors v. Geoffrey Robertson [2002] 2 CLJ 493; [2002] CLJ JT(4) FC ***(refd)***

Dato' Tan Heng Chiew v. Tan Kim Hor [2006] 1 CLJ 577 FC ***(refd)***

Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors [1995] 3 CLJ 328 FC ***(refd)***

Jude Philomen Benny v. Majlis Peguam Malaysia [1997] 5 MLJ 306 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd (Civil Appeal Nos: 02-19-2006 (W) & 02-20-2006 (W)) ***(refd)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC ***(refd)***

Phileo Promenade Sdn Bhd & Anor v. Premier Model (M) Sdn Bhd [2003] 1 CLJ 854 CA ***(refd)***

Porter & Anor v. Magill [2002] 1 All ER 465 ***(refd)***

Re B Larbalestier QC [1987] 2 CLJ 34; [1987] CLJ (Rep) 489 HC ***(foll)***

Re Charles Gray QC [1998] 3 MLJ 413 ***(foll)***

Re Graham Starforth Hill [1971] 2 MLJ 269 ***(foll)***

R v. Gough [1993] AC 646 ***(refd)***

Re SK Lee [1971] 2 MLJ 40 ***(foll)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 375 FC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 64
Contracts Act 1950, s. 75
Legal Profession Act 1976, ss. 18(1)(a), (b), (3), 11(2), 19

For the appellants - Cyrus Das (Benjamin Dawson, Steven Thiru, Noraisyah Abu Bakar, Koh San Tee & David Mathew with him); M/s Noraisyah & Co

For the Attorney General Malaysia - Azizah Hj Nawawi SFC (Suzanna Atan SFC with her)

For the Bar Council Malaysia - George Varghese; M/s George Varghese & Co

For the Kuala Lumpur Bar Committee - M Puravalen (Sanjeev Kumar with him); M/s GK Ganesan Saiful & Rokiah

For Metramac Corp Sdn Bhd - Muhammad Shafee Abdullah (S Sivaneindiren, Peter Skelchy with him); M/s Cheah Teh & Su

For Tun Che Abdul Daim Hj Zainuddin - Cecil Abraham (Sunil Abraham with him); Shearn Delamore
For Tan Sri Halim Saad - Tommy Thomas (Alan Gomez & Jason Wee with him); M/s Tommy Thomas

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-17-9-06]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim FCJ:

Background

[1] This appeal came before us on 14 June 2006. The appeal is against the decision of the High Court Kuala Lumpur refusing the application of an ad hoc admission of the appellant, Cherie Booth QC to the Malaysian Bar pursuant to s. 18(1) of the Legal Profession Act 1976 (the LPA) for the purpose of appearing in two Federal Court appeals: *Metramac Corp. Sdn. Bhd. v. Fawziah Holdings Sdn. Bhd.* (Civil Appeal Nos. 02-19-2006 (W) and 02-20-2006 (W)).

[2] The Court of Appeal which first heard the two appeals delivered its decision on 12 January 2006 in favour of Fawziah Holdings and awarded the sum of RM65,182,920 with interest and further decreed that sums due under certain 'future contracts' were to be assessed and paid to Fawziah Holdings. The decision of the Court of Appeal was reported in [2006] 1 MLJ 505; [2006] 1 CLJ 996; [2006] 2 AMR 1.

[3] In the course of its judgment, the Court of Appeal had made observations about certain third parties namely Tun Daim Zainuddin and Tan Sri Halim Saad who later applied to intervene in the Federal Court to expunge all the remarks made about them in the judgment.

[4] On 15 May 2006 the Federal Court gave leave to Metramac to appeal against the judgment of the Court of Appeal on the following three questions:

(i) Whether the creation of a trust under the agreement amounts to an illegal reduction of its capital.

(ii) Whether the test adopted by the Court of Appeal in determining whether cl. 8 of the Signage Agreement is a stipulation by way of a penalty and/or a sum named in the contract for purposes of s. 75 of the Contracts Act 1950, is the correct test/or is exhaustive.

(iii) Whether the Court of Appeal's adverse remarks in the circumstances of the case showed a real danger of bias in the judgment arrived at against Metramac.

[5] And at the same time the Federal Court directed that the applications by the interveners to expunge the remarks are to be heard together with the appeals proper.

[6] This appeal comes direct to the Federal Court by virtue of s. 19 of the LPA.

[7] The Attorney General, the Bar Council, the Kuala Lumpur Bar Committee, Metramac and the two interveners namely Tun Daim Zainuddin and Tan Sri Halim Saad, took a united stand to oppose the application. Their main ground of objection was that the appellant had no special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

[8] It is worthy of note that under s. 19 of the LPA only the institutional bodies ie, the Attorney General, the Bar Council and the Bar Committee who are regarded as 'objectors' and the appellant applicant have a right of appeal to the Federal Court on a decision of the High Court under s. 18(1) of the LPA. It therefore follows that the adversaries on the appeal like Metramac and the interveners are not entitled to object or support the appellant's applications. They may express their views which the court must have regard to (see s. 18(3) of the LPA) but the court is not bound by their views.

[9] At the conclusion of the arguments of all the parties, we, on 15 June 2006, unanimously dismissed the appeal with costs. Here are our reasons.

Special Qualifications Or Experience

[10] Section 18(1) of the LPA reads:

> Notwithstanding anything contained in this Act, the Court may, for the purpose of any one case and subject to the following subsections, admit to practise as an advocate and solicitor any person who if he was a citizen of, or a permanent resident in,

> Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court and no person shall be admitted to practise as an advocate and solicitor under this subsection unless:
>
> (a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and
>
> (b) he has been instructed by an advocate and solicitor in Malaysia.

[11] The onus is on the appellant to show that she has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia (see *Jude Philomen Benny v. Majlis Peguam Malaysia* [1997] 5 MLJ 306).

[12] On s. 18(1)(b) of the LPA, it is a non-issue as the appellant has satisfied its requirement.

[13] According to Sharma J in *Re S.K. Lee* [1971] 2 MLJ 40, the words "special qualifications" mean:

> .. an accomplishment of an exceptional degree on such that excels in some way the measure of accomplishments reached by the advocates and solicitors of Malaysia ... Instances would be of persons who specialize, for example, in income tax law, or trade marks, divorce practice, shipping law, etc and have achieved such heights in the exercise of their profession that they stand out as great luminaries in the firmament of law.

[14] Whereas Mohd Dzaiddin J (as he then was) in *Re B Larbalestier QC* [1987] 2 CLJ 34; [1987] CLJ (Rep) 489 opined "special qualifications or experience" as follows:

> I think what the law intended to mean is that special qualifications or experience are required to be of a quality and type which cannot be had amongst the advocates and solicitors in Malaysia.

[15] And in *Re Graham Starforth Hill* [1971] 2 MLJ 269 at pp. 270 and 271 para "I" Mohamed Azmi J (as he then was) described "special qualifications or experience" as follows:

> In my view, the words "special qualifications or experience" refer to the particular branch of the law as a whole to which the relevant case relates rather than to the facts of the case or to a particular statute or certain provisions of that statute to which the case may relate.

The above view of Mohamed Azmi J (as he then was) was discussed and adopted in *Re Charles Gray QC* [1998] 3 MLJ 413.

[16] Thus, applying the above principles to the facts of this case, we agree with the learned counsel for the appellant that the appellant is an outstanding Queen's Counsel specializing in public law, administrative law and commercial law. She was called to the English Bar in 1976. In the Matrix Chambers website she is described as "Cherie is a leading Silk specializing in public law ..." (see p 940 vol. 3 of the appeal record). She was also described in the international legal publication called Legal 500 as a leader, *inter alia*, in administrative and public law. The appellant further appears regularly in the British House of Lords and Court of Appeal. She has also appeared in the European Court of Justice and in Commonwealth jurisdictions like Bermuda and the Cayman Islands. In addition, she is also a Recorder (part-time judge) in the County Court and Crown Court and has given numerous public lectures and has authored many articles and books.

[17] Therefore, on the appellant's expertise, the learned judge was right in holding that the appellant is a leading Queen's Counsel distinguishing herself in public and administrative law. However, the learned judge was not quite right when she held further that it is not sufficient that the appellant be a specialist in public law *per se* but that she must also be a specialist on the issue of judicial bias. As the learned judge said at p. 16 of the appeal record: "There is no evidence before me that she has appeared and argued before the court in the United Kingdom or anywhere else on the issue of judicial bias." To our minds, the "special qualifications or experience" under s. 18(1)(a) of the LPA refers to the particular field of the law which that particular case is related and not in respect of each and every issue that arises in that case (see *Re Graham Starforth Hill, supra*). Thus, the learned judge's insistence on specialization on a specific issue as opposed to the area of the law in which this case falls is too stringent a requirement. It is therefore erroneous on her part to impose such a requirement of qualification for an ad hoc admission under s. 18(1)(a) of the LPA.

Non-availability Of Advocates And Solicitors In Malaysia

[18] On the issue of non-availability of advocates and solicitors in Malaysia with similar qualifications or experience, we respectfully agree with the opinion of the learned High Court judge that such expertise are available amongst local advocates and solicitors.

[19] Sharma J in *S.K. Lee, supra* observed:

> The words "not available" used in sub-section (2)(a) [of section 8A of the Advocates and Solicitors Ordinance, 1947 which are in *pari materia* with section 18(1)(a) of the LPA] seem to mean "not obtainable". It would thus seem that it is the excelling virtue born of the applicant's special qualifications or experience that has got to be considered and that excelling virtue must be such as outclasses the excellence to be found in the local lawyers. The special qualifications or experience are required to be of a quality and type which cannot be had amongst the advocates and solicitors in Malaysia: The applicant may have special qualifications or experience but that alone does not seem to be sufficient under the statute. He has to go further and satisfy the court that the special qualifications he possesses or the experience he professes to have are comparatively of such a type and character that no advocate and solicitor practising in Malaysia can be said to possess or equal that high degree of accomplishment which has been acquired or exhibited by the applicant. I have said earlier that in my view section 8A seems apparently aimed to facilitate the admission of those members of the Bar from other countries who have attained renown and distinction.

[20] We fully subscribe to Sharma J's observation on the words "not available" in relation to the non-availability of local advocates and solicitors with the special qualifications or experience in comparison to the special qualifications or experience of an applicant for an ad hoc admission to the Malaysian Bar. The special qualifications or experience that is required under s. 18(1)(a) of the LPA must be of a high degree of quality and type which cannot be found in local lawyers.

[21] With regard to the questions framed for the purpose of the appeal before the Federal Court, the 1st and 2nd questions involve the interpretation of s. 64 of the Companies Act 1965 and s. 75 of the Contracts Act 1950 respectively. In so far as the 2nd question is concerned there is a Federal Court decision in *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 375 in which local Malaysian counsel appeared. Thus, I agree with the learned judge when she said at p. 16 of her judgment on the two questions:

> To my mind, a local advocate and solicitor will be very much placed to interpret and argue the authorities of s. 64 of the Companies Act and s. 75 of the Contracts Act.

[22] The 3rd question is that of judicial bias. The laws on the issue of judicial bias have been decided by our Federal Court in the following cases:

(i) *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65.

(ii) *Mohamed Ezam bin Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701.

(iii) *Dato' Tan Heng Chiew v. Tan Kim Hor* [2006] 1 CLJ 577.

And in these cases the parties were represented by Malaysian lawyers, namely, Dato' Dr. Cyrus Das, Dato' R.R. Sethu, Dato' Cecil Abraham, Dato' Muhammad Shafee Abdullah and Tuan Haji Sulaiman Abdullah, to mention a few. Obviously, they must have a deep understanding of the law on judicial bias to effectively submit to the court.

[23] It must be noted that in Malaysia the law in relation to judicial bias is premised on the "real danger of bias" test as propounded in *R v. Gough* [1993] AC 646 unlike in the United Kingdom, where the appellant is practising, the test is premised on the "real possibility of bias" as advocated by the House Lords in *Porter & Anor v. Magill* [2002] 1 All ER 465.

[24] On the issue of expunging the remarks made by the Court of Appeal in its written grounds of judgment against the interveners, there is indeed clear indication from local authorities as to the circumstances in which such applications will be allowed. There are two Malaysian cases on the point and they were ably argued by our advocates and solicitors. These two cases are:

(i) *Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors* [1995] 3 CLJ 328.

(ii) *Phileo Promenade Sdn Bhd & Anor v. Premier Model (M) Sdn Bhd* [2003] 1 CLJ 854.

[25] Now reverting to the appeal before us, it is pertinent to note that Fawziah Holdings had appointed Dato' R.R. Sethu as senior counsel to argue the case in the High Court. In the Court of Appeal, Fawziah Holdings appointed Dato' Dr. Cyrus Das as senior counsel. Both are senior members of the Bar and they are experienced and capable of handling the pending appeals in the

Federal Court. Dato' Dr. Cyrus Das (called to the Malaysian Bar in 1973) and Dato' R.R. Sethu are familiar personalities in this court and we are all aware of their capabilities as counsel. They need no introduction. It is therefore not true that there is no availability of local advocates and solicitors of a quality and type amongst the 12,000 of them in Malaysia who are equally qualified and experienced to handle the appeals before us.

[26] Further, there is another matter that needs to be considered. The appellant was not present during the trial in the High Court and in the Court of Appeal. Thus, the question – to what extent the appellant would effectively be able to assist the Federal Court? Surely, a foreign counsel, like the appellant, lacking in local knowledge and not having handled the trial and the appeal, would necessarily be disadvantaged in handling the appeals in the Federal Court.

[27] In the light of the above, we with regret had to dismiss the appellant's appeal with costs because we agreed with the learned judge of the High Court that it has not been demonstrated that for the two appeals before the Federal Court, the appellant has special qualifications and experience of a nature not available amongst advocates and solicitors in Malaysia. The two appeals could competently be handled by a local advocate and solicitor.

[28] However, that is not the end of the matter. At the outset of the hearing of this appeal, the Right Honourable Chief Justice Tun Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim questioned whether foreign lawyers could be admitted to the Bar without Bahasa Malaysia qualification as required under s. 11(2) of the LPA. After hearing the parties, we expressed our reservation on the correctness of the decision in *Attorney General & Ors. v. Geoffrey Robertson* [2002] 2 CLJ 493; [2002] CLJ JT(4) where the Federal Court ruled that s. 11(2) is not applicable to an ad hoc admission under s. 18(1) of the LPA. We, however, did not propose to revisit the decision at this juncture as it was not essential for the determination of this appeal. We would leave the matter to another occasion.

[29] The learned Chief Justice, the learned Chief Judge (Sabah and Sarawak) and my learned brothers Abdul Hamid Mohamad and Alauddin FCJJ, had read this judgment in draft and had expressed their agreement with it.